NO. 75-683

In the Supreme Court of the United States
OCTOBER TERM 1975

NMS INDUSTRIES, INC.,

Petitioner

v.

HAROLD B. SCHWARTZ and ERIC ROSENBAUM,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATUTES AND RULES

MISCELLANEOUS

In the
SUPREME COURT OF THE UNITED STATES

NO.

NMS INDUSTRIES, INC.,
Petitioner,

v.

HAROLD B. SCHWARTZ and ERIC ROSENBAUM,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on August 18, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, infra, p. A-1. The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is printed in Appendix B hereto, supra, p. B-1. Neither opinion has been reported to date.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 18, 1975; a timely motion for rehearing was filed and that motion was denied on September 12, 1975. The jurisdiction of this Court is invoked under 28 U.S.C.(1).

QUESTIONS PRESENTED

(1) Whether, assuming Petitioner converted Respondents' unregistered stock when it refused to register same, Respondents can keep the unregistered stock and recover its value too?

(2) Whether Petitioner's refusal to honor Respondents' bad faith demand for registration of 100% of their unregistered stock constitutes a conversion of registered stock?

(3) Assuming Petitioner committed an actionable wrong when it refused to register Respondents' unregistered stock, whether the proper measure of damages, if any, is

based upon breach of contract or upon conversion?

(4) Whether Respondents can predicate a recovery herein on a demand for performance they admitted making in bad faith which utterly fails to satisfy the conditions precedent of the Registration Agreement itself?

(5) Whether the Agreement to register Respondents' unregistered stock in the Inland Dynatronics registration constituted a novation extinguishing Respondents' right to a cost-free registration under paragraph 4(a) and 4(d) of the Registration Agreement?

(6) Whether Respondents are estopped from asserting a breach of the Registration Agreement by their conduct in withdrawing from the Inland Dynatronics registration?

(7) Assuming the agreement to register Respondents' unregistered stock in the Inland Dynatronics registration did not constitute a novation, whether Petitioner performed its obligations under the Registration Agreement when Petitioner offered and Respondents accepted Petitioner's offer to include their unregistered stock in the Inland Dynatronics registration statement?

STATEMENT OF THE CASE

Jurisdiction of the U.S. District Court below is based upon diversity of citizenship under 28 U.S.C. 1332.

While Petitioner recognizes that this Honorable Court must exercise a great deal of discretion before accepting

a writ of certiorari, instances do arise which merit the exercise of that discretion lest a serious miscarriage of justice go uncorrected. Such is the case at bar! The judgments of the courts below not only fail entirely to give effect to the controlling law of the State of Texas but also reward sharp practice and conduct admittedly undertaken in bad faith, thus visiting a serious injustice and inequity upon Petitioner.

The parties stipulated in the court below to the following material facts (R. 3-7; 18-22; 38; 54-56).

Petitioner, NMS Industries, Inc., acquired a wholly owned Texas corporation from Respondents for 85,000 shares of NMS Industries, Inc., unregistered, lettered common stock ("unregistered stock") -- 66,500 shares delivered on May 1, 1970, and 14,250 shares delivered on June 24, 1971. The remaining 4,250 shares of unregistered stock was delivered to David R. Barnes (3,500 on May 1,1970, and 750 on June 24, 1970) for assisting Respondents in arranging the transaction.

Petitioner and Respondents also executed a Registration Agreement (Pl. & Df. Ex. 1), the purpose of which was to provide Respondents with two alternative mediums through which they could have 25% of their stock registered during the first year after delivery or 50% of their stock registered during the second year after delivery, all at Petitioner's expense. Said agreement provides specifically that "it is agreed and understood that NMS shall be required to file only one such Registration Statement..." (Pl. & Df. Ex. 1; R. 12-13).

In early 1970, Petitioner commenced registration proceedings with the Securities and Exchange Commission ("S.E.C.") on a Form S-1 registration statement relating to an offering by Samuel L vitt, Jack Liss and David Barnes of NMS Industries, Inc. common stock (hereinafter referred to as the Inland Dynatronics registration). Petitioner informed Respondents of this proposed registration and offered to include their unregistered stock in said registration statement entirely at Petitioner's expense. Respondents accepted Petitioner's offer to include their unregistered stock, cost-free in the Inland Dynatronic's registration statement (R. 19-20 and 43-44) *--a registration that would have registered on August 19, 1971, the identical shares which Respondents now contend Petitioner has wrongfully refused to register* (R. 20). Later, by letter dated July 1970 (Df. Ex.4) Respondents withdrew their unregistered stock from the Inland Dynatronics registration statement and waived further notice thereof. The Inland Dynatronics registration became effective August 19, 1971, and, but for Respondents' withdrawal therefrom, this unfortunate suit would not have arisen. The 3,500 shares acquired by David R. Barnes for arranging the transaction between Respondents and Petitioner was included in the Inland Dynatronics registration and duly registered (Df. Ex. 5 and R. 20).

By letters dated August 30, 1971, (Pl. Ex. 11) and September 9, 1971 (Df. Ex. 13), a scant 11 days after the effective date of the Inland Dynatronics registration, Respondents demanded that Petitioner register "*all* of their stock" cost-free. Respondents stipulated that they were acting in bad faith when they made this demand (R. 21) and that it would have cost Petitioner in excess of $75,000

to prepare and file a second and separate registration after the Inland Dynatronics registration became effective (R. 19-20 and R. 43-44). Petitioner declined to honor this bad faith demand on the advice of counsel that same was not in compliance with the Registration Agreement (Tr. 107-108).

In addition to the foregoing facts stipulated by the parties the trial court heard evidence on the issue of damages and on whether Respondents had failed to mitigate their damages, if any.

There is *no evidence* whatsoever in this record as to the value of *unregistered* stock as of any date. The only evidence in this record on the value of *registered* NMS Industries, Inc. stock is Plaintiff's Exhibit 13 and the testimony of Respondents' "expert." The exhibit contains nothing more than a sporadic listing of stock quotations for registered stock on some of the dates between September 2, 1971, to August 31, 1973. The "expert's" testimony related only to the value of registered stock as of the date of trial (Tr. 48).

The trial court awarded damages based upon the average value of *registered* NMS Industries, Inc. common stock for the period from April 15 through April 30, 1975. (R. 75) In doing so, the trial court itself recognized that the record stood naked of proof of damages in its Memorandum Opinion (R. 75) and called for proof of damages "by affidavit of the plaintiffs" (R. 75-76). Even assuming that such "evidence" could be properly considered (thus negating any right of cross-examination), this record contains no such affidavits or other basis for the trial court's award of damages.

REASONS FOR GRANTING THE WRIT

Both judgments of the courts below hold that Petitioner converted Respondents' stock when it declined to honor their bad faith demand for registration of 100% of their stock and base the measure of recovery on the value of *registered* stock. However, neither judgment contains a provision for transfer of the title to the converted property to the Petitioner. Assuming arguendo that Petitioner committed an actionable wrong when it refused to succumb to Respondents' bad faith demands, the judgments below are clearly erroneous for several reasons.

a. JUDGMENT FOR CONVERSION MUST PROVIDE FOR A TRANSFER OF THE TITLE OF THE PROPERTY ALLEGEDLY CONVERTED TO THE DEFENDANT

In the first place, it is an elementary rule of law that a successful suit for conversion amounts to a forced sale and that the judgment rendered *must* provide that upon payment of the money judgment, the ownership of the property is to vest in the defendant. *Alexander Schroeder Lumber Co. v. Mineralis y Metalis, S.A.I.C.*, 5 Cir., 331 F.2d 135, 138 (1964); *Fox v. Amer. Propane, Inc.*, 508 S.W. 2d 426, 428 (Tex.Civ.App. 1974, *error ref'd, n.r.e.*) and *Gillette v. Houston Nat. Bank*, 139 S.W. 2d 646, 652 (Tex.Civ.App. 1940, *error dismd., J.C.*). The judgments below however fail entirely to recognize this and, in essence, allow Respondents a double recovery herein.

b. ASSUMING PETITIONER'S FAILURE TO SUCCUMB TO RESPONDENTS' BAD FAITH DEMAND CONSTITUTED AN ACTIONABLE WRONG, THAT WRONG, IF ANY, WAS A BREACH OF THE REGISTRATION AGREEMENT AND NOT A CONVERSION.

Secondly, the judgments below erroneously award damages based upon the value of registered stock when the record shows conclusively that Respondents never owned nor possessed registered stock and Petitioner never denied Respondents' title to said stock or otherwise exercised any control over same. If Petitioner converted any property belonging to Respondents, it, of necessity, must have been unregistered stock because that is all that Respondents ever had. Stated simply, it is impossible to convert property which does not even exist. Thus Respondents cannot recover for conversion of registered stock because they never owned registered stock. Nor can they recover for a conversion of Respondents' unregistered stock because Petitioner never had possession, custody or control over same and never exercised any control, adverse or otherwise, to Respondents' title or possession of said stock. Furthermore, there is no evidence in this record as to the value of unregistered, lettered NMS Industries, Inc. common stock.

A more glaring error in the judgments below is the holding that there was a conversion in the first place. Assuming Petitioner committed an actionable wrong, that wrong, if any, was a breach of contract and not a conversion. A mere breach of contract does not constitute a conversion. 89 C.J.S. Trover and Conversion, Sec. 4, p. 535; *Byron v. York Investment Co.*, 926 P. 2d 742, 745 (Cal. Sup. Ct.

1956). The Court of Appeals in several places in its decision states that Petitioner breached the registration agreement and concludes that "the trial court correctly held NMS liable for the consequences of their breach of the registration agreement." Thus, the damages recoverable herein, if any, for a *breach of the registration agreement* should and must be in accordance with well-established Texas law applying the universal rule for measuring damages for breach of contract-- placing the injured party in the position he would have occupied had the wrong not occurred. *Reaugh v. Mc Collum Exploration Co.*, 139 Tex. 485, 163 S.W. 2d 620, 621 (1943); *Riddle v. Lanier,* 136 Tex. 130, 145 S.W. 2d 1094, 1096-1097 (1941); *Mays v. Witt,* 387 S.W. 2d 688, 690 (Tex. Civ. App. 1965, n.w.h.); *Manney v. Burgess,* 346 S.W. 2d 937 (Tex. Civ.App. 1961, n.w.h.); *LeBlanc, Inc. v. Gulf Bitulethic Co.*, 412 S.W. 2d 86, 94 (Tex.Civ.App. 1967), *error ref's, n.r.e.);* and *Guardian Trust Co. v. Brothers,* 59 S.W. 2d 343 (Tex.Civ. App. 1933, *error ref'd.)* . Placing Respondents in the position they would have occupied had the (assumed) wrong not occurred, they would have held registered stock instead of unregistered stock -- thus the measure of damages is the difference in value between registered and unregistered, lettered NMS Industries, Inc. common stock. Since there is no evidence in this record of the value of unregistered, lettered NMS Industries, Inc. common stock, the court would have to speculate in order to award Respondents a recovery based upon the difference in value between registered and unregistered stock. This the law does not allow. In addition, the court cannot award Respondents the full value of registered stock and award Petitioners the unregistered stock because of the finding by both courts below that Respondents failed to mitigate their damages

by failing to take advantage of a sale under S.E.C. Rule 144. Thus, under the state of the record as it now exists, any damage award would not do equity nor justice to Petitioner.

The Court of Appeals cites two cases in support of their holding that Petitioner converted Respondents' stock -- *Sandor Petro. Corp. v. Williams,* 321 S.W. 2d 614 (Tex.Civ. App. 1959, *error ref'd, n.r.e.)* and *B&H Warehouse, Inc. v. Atlas Van Lines, Inc.*, 5 Cir., 490 F.2d 818 (1974). Suffice it to say that *Sandor, supra,* involved an unauthorized cancellation of the shares held by the injured party and *B&H Warehouse, Inc., supra.*, held only that a restrictive legend was invalid. Neither hold that a breach of an agreement to register stock constitutes a conversion. Nor do the cases cited by the trial court holding that the failure to transfer stock on the books of a corporation recognize such a rule. There simply was no conversion!

c. PETITIONER COMMITTED NO ACTIONABLE WRONG WHEN IT DECLINED TO HONOR RESPONDENTS' BAD FAITH DEMAND FOR REGISTRATION OF 100% OF THEIR STOCK

Both decisions of the courts below holding that Petitioner committed an actionable wrong when it refused to comply with Respondents' bad faith demands completely ignore the facts stipulated to by the parties and the controlling Texas Law with respect thereto. As a result Petitioner is forced to bear the consequences of Respondents' inconsistent, inequitable and bad faith conduct seeking double performance from Petitioner. Surely justice is not so blind.

Paragraph 4 of the Registration Agreement (Pl. and Df. Ex. 1; R. 10-14) spells out the terms and conditions of Petitioner's obligation to register Respondents' stock. Subparagraph 4(a) makes that obligation contingent upon Petitioner's receipt of a written demand for registration from Respondents in which they agreed:

> "not to offer more than 25% of (their) Shares received under the Agreement for such registration during the one (1) year period after the Delivery Date, or more than an additional 25% of such Shares for such registration during the second year after such Delivery Date."

The Delivery date of the stock was on or about May 1, 1970 (R. 5). This would mean, therefore, that, as of August and September, 1971, Respondents' demand letter should only request registration of, *at a maximum,* 50% of their stock in order to make absolute the obligation of Petitioner to undertake and complete registration proceedings in their behalf. However, Respondents demanded that Petitioner register "*all* of their stock." (Pl. Ex. 13). Respondents stipulated that they were in bad faith when they made this demand for double performance (R. 21 and R. 45) a scant 11 days after Inland Dynatronics became effective . . (a registration which would have registered the very stock the subject matter of their demand). It is readily apparent that it was never the intent or purpose of Respondents to recognize or comply with the limitations and conditions contained in this agreement. Since Respondents failed to satisfy the conditions precedent to Petitioner's obligation under the Registration

Agreement, no liability can arise on Petitioner's promise to register their stock cost-free. 13 Tex. Jr. 2d Contracts, Sec. 280, pp. 516-518; 17 Am. Jur. 2d Contracts, Sec. 357, p. 796; *Gulf Pipe Line Co. v. Nearen,* 135 Tex. 50, 135 S.W. 2d 1065, 1068 (1940); *City of Fort Worth v. Rosedale Park Apartments,* 276 S.W. 2d 395, 397 (Tex.Civ.App. 1955, *error ref'd*); *W.T. Rawleigh Co. v. Izard,* 113 S.W. 2d 620 (Tex.Civ.App. 1938, n.w.h.); and *Courreges v. System Freight Service, Inc.,* 152 S.W. 2d 841 (Tex.Civ.App. 1941, n.w.h.).

The Court of Appeals ignores Respondents' failure to satisfy the condition precedent to Petitioner's obligation by erroneously assuming that Respondents demanded registration of only 50% of their stock. Both of the letters requesting registration (Pl. Ex. 11 and Df. Ex. 13) were sent on behalf of Respondents by Stanley M. Kaufman. The first letter sent requests registration of 50% of Respondents' stock, *but* the second letter "*corrects*" the first by requesting registration of "*all* of their stock" in the following terms:

> "This is to serve as correction of my letter to you dated August 30th to the extent that Messrs. Rosenbaum and Schwartz request *all* of their stock registered rather than *50%.*" (Emphasis theirs)

The *only* feasible interpretation of the second letter is that *Kaufman was originally instructed by Respondents to request registration of all of their stock,* that he mistakenly requested registration of only 50% and that he *corrected this mistake* by requesting "*all* of their stock registered

rather than *50%.*" Kaufman's second letter even refers to the first, August 30th letter. The simple effect of this second letter was to erase and withdraw the request to register 50% of the stock and substitute in lieu thereof a demand for registration of 100% of their stock, thus making the first, August 30, 1971 letter correctly reflect Respondents' *original demand that Petitioner register "all* of their stock." When this Court considers the additional fact that Respondents admitted that they were in bad faith when they demanded registration of their stock, the conclusion to be reached is mandatory: -- *Respondents never demanded registration of only 50%* of their shares, but *demanded* registration of "*all* of their stock."

Once this Court reaches this inescapable conclusion, the legal effect of Respondents' 100% demand, considered in light of the Registration Agreement and the foregoing authority, is simple: The Registration Agreement (Pl. and Df. Ex. 1) *expressly conditions* Petitioner's obligation to register Respondents' stock cost-free upon receipt of their written demand requesting registration of *at a maximum,* 50% of their holdings. Respondents did not satisfy this condition precedent by demanding registration of *up to* 50% of their stock but, instead, greedily made a bad faith demand for registration of "*all* of their stock." Since a *condition precedent must be exactly performed or fulfilled before the promise which it conditions can be enforced,* Respondents cannot recover herein.

The stipulated facts also show that even before this bad faith demand was made by Respondents, they had no right to a cost-free registration under the Registration Agree-

ment simply because their acceptance of Petitioner's offer to register their stock cost-free in the Inland Dynatronics registration constituted a novation. The Court of Appeals glosses over this by erroneously concluding that when Petitioner offered to include Respondents' stock in the Inland Dynatronics registration it "only offered to perform its original contractual duty to provide one cost-free registration", and, second, that "there was also no consideration for the 'new agreement.'"

The Registration Agreement (Pl. and Df. Ex. 1) *does not* simply obligate Petitioner to provide Respondents with one cost-free registration! It merely furnishes two medium through which Respondents can have their stock registered at Petitioner's expense. In particular, the pertinent provision of paragraph 4(a) provides:

> "4(a) NMS agrees that if, in the opinion of its counsel, or Shareholder's aforesaid counsel, any offer, sale or other disposition by a Shareholder of any shares will require (i) the registration of such shares under the Act, or (ii) the delivery of a prospectus which complies with Section 10 of the Act; upon receipt at any time within the three (3) year period, commencing with the Delivery Date specified in said Agreement, of a written demand from Shareholders who then hold at least 50% of the NMS Common Stock received under the Agreement, it will cause a registration statement with respect to the shares which the Shareholders propose to sell or otherwise dispose of to be filed under the Act."

and of paragraph 4(d) provides:

> "(d) If at any time from the Delivery Date and before the expiration of four (4) years thereafter NMS files with the Securities and Exchange Commission a registration statement on Form S-1 *relating to an offering by it of its securities,* NMS will give to the Shareholders written notice of the proposed filing 30 days in advance thereof and, if within 10 days thereafter it has received notice from one or more of the Shareholders that they wish to sell shares and to have such shares included in such registration statement, NMS will cause such shares to be included in such registration statement unless. . ." (Emphasis added).

There is no question that the Inland Dynatronics registration did not arise on Respondents' written demand for registration and therefore that it does not fall under the provisions of paragraph 4(a). Nor does the Inland Dynatronics registration come under paragraph 4(d) "relating to an offering by it (NMS) of its securities." Df. Ex. 5, the Form S-1 of Inland Dynatronics, expressly states: "Prospectus covers 124,276 issued and outstanding Shares of Common Stock of NMS Industries, Inc., which may be offered . . . by certain Selling Shareholders named herein. . ." Those named "Selling Shareholders" are Levitt, Liss and Barnes – not Petitioner. Therefore, when Petitioner offered to piggy-back Respondents' shares in the Inland Dynatronics registration statement it was, in fact, offering to do something that it was not already contractually bound to do – furnishing Respondents with *a new and third medium of registration*

not contemplated by the Registration Agreement. This was a sufficient consideration to support the novation. *Wright v. Donabauer,* 137 Tex. 473, 154 S.W. 2d 637, 639-640 (1941); *Gulf Production Co. v. Continental Oil Co.,* 139 Tex. 191, 164 S.W. 2d 488, 491 (1942), *McDonald v. McDonald,* 143 S.W. 2d 142 (Tex.Civ.App.1940, Dismd. J.C.); *Worth Petro.Co. v. Callihan,* 82 S.W. 2d 1060 (Tex.Civ.App. 1935, n.w.h.); *Currie v. Trammel,* 289 S.W. 736 (Tex.Civ.App. 1927, error ref'd.) and *DeArcy v. South Texas Music Co.,* 208 S.W. 281 (Tex.Civ.App. 1919, *n.w.h.).*

Furthermore, it was not necessary for the parties to express their intention for the extinguishment of the old obligation. The intent to extinguish the old contract may be inferred from the facts and circumstances surrounding the new contract itself. *Hardison v. Beard,* 430 S.W. 2d 53 (Tex. Civ.App. 1968, *error ref'd., n.r.e.); Ridgleawood, Inc. v. White,* 380 S.W. 2d 766 (Tex.Civ.App.1964, n.w.h.); *Chastian v. Cooper & Reed,* 152 Tex.322, 257 S.W. 2d 422 (1953). The intention to extinguish Petitioner's obligation under the original Registration Agreement is fully and conclusively established by the simple fact that the new agreement provided for the cost-free registration of the stock owned by Respondents – there simply was no purpose left for the Registration Agreement to serve.

Assuming in the alternative that this new agreement did not constitute a novation, Respondents' inconsistent, bad faith conduct in rejecting the cost-free registration tendered by Petitioner did prejudice the rights of Petitioner and, therefore, estops Respondents from asserting that Petitioner breached the Registration Agreement.

Respondents stipulated in this record that they accepted the offer of Petitioner to include their unregistered stock in the Inland Dynatronics registration, that this was to be done completely expense-free for Respondents, and that it would have cost Petitioner in excess of $75,000 to prepare and file a second and separate registration after the Inland Dynatronics registration became effective (R. 19-20; R.43-44). It is also an undisputed fact that Respondents' unregistered stock could have been included in the Inland Dynatronics registration at little or no extra cost to Petitioner (Tr. 109-110).

Therefore, it is easily seen that, by reason of Respondents' waiver of the Inland Dynatronics registration and Petitioner's forced withdrawal of their unregistered stock from said registration, Petitioner lost a very valuable contract right -- one worth in excess of $75,000. To allow Respondents to reassert their alleged contract right to a cost-free registration upon a demand admittedly made in bad faith a mere 11 days after the Inland Dynatronics registration became effective would not only defy all sense of justice and equity, but would also permit Respondents to cast upon Petitioner the consequences resulting from their own inconsistency. Such certainly does not appeal to the conscience of the Chancellor and the equitable doctrine of estoppel precludes such a "pound of flesh" mode of dealing.

In 31 C.J.S., Estoppel, Sec. 1, p. 192, it is said:

> "The purpose of estoppels is to prevent inconsistency and fraud resulting in injustice."

In *Davis v. Allison*, 109 Tex. 440, 211 S.W. 980, 984 (1919), the Texas Supreme Court declared:

> "Estoppel is a doctrine for the prevention of injustice. It is for the protection of those who have been misled by that which upon its face was fair, and whose character as represented parties to the deception will not in the interest of justice, be heard to deny."

In the case at bar, it is stipulated that Respondents' stock would have been duly registered along with Messrs. Levitt, Liss and Barnes' stock had Respondents not backed out of their agreement to have their stock included in such registration. Now Respondents seek to force Petitioner to bear the consequences resulting directly from their own conduct by claiming that Petitioner failed to honor their bad faith demand made almost immediately after the Inland Dynatronics registration became effective. Inconsistency is the cause, injustice the result, and estoppel the prevention and cure!

That an estoppel can be established on inconsistent conduct is clearly established in Texas. *Brown v. Federal Land Bank of Houston*, 180 S.W. 2d 647, 652 (Tex.Civ.App. 1944, *error ref'd., W.M.);Union Central Life Ins. Co. v. Austin*, 52 S.W. 2d 536, 538 (Tex.Civ.App. 1932, *error ref'd.); First State Bank of Riesel v. Dyer*, 248 S.W. 2d 785, 788 (Tex.Civ.App. 1952) affirmed 151 Tex. 650, 254, S.W. 2d 92 (1953); and *Carnell v. Rinser*, 196 S.W. 2d 941, 943 (Tex.Civ.App. 1946, *error ref'd.)*. It is stipulated that Respondents' unregistered stock would have been registered

by August 19, 1971, cost-free, if Respondents had not unilaterally withdrawn from the Inland Dynatronics registration. Petitioner's act of reliance on this withdrawal cannot be questioned because it had no choice but to take Respondents' stock out of the Inland Dynatronics registration. As an estoppel will be raised in favor of one who, in reliance upon the conduct of another has been deprived of an opportunity to save himself from injury [3 Pomeroy's Equity Jurisprudence, Sec. 812, pp. 232-235 (5th ed. 1941), *Schwartz v. National Bank of Texas,* 67 Tex. 217, 2 S.W. 865 (1887), *Weinstein v. Nat. Bank of Jefferson,* 69 Tex. 38, 6 S.W. 171 (1887), *Fifth Nat. Bank of San Antonio v. Iron City Nat. Bank of Plano,* 92 Tex. 436, 49 S.W. 368 (1899), *Leather Manufacturer's Nat. Bank v. Morgan,* 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811 (1886), *Rowe v. James,* 71 Wash. 267, 128 Pac. 539, 541 (1912)], Petitioners inability to retrieve its former position when Respondents made their bad faith demand just 11 days after Inland Dynatronics became effective clearly satisfies the requirement that Petitioner suffer harm as a result of Respondents' inequitable conduct. The conclusion is inescapable, therefore, that, under well-established equitable principles of Texas law, Respondents cannot cast upon Petitioner the consequences resulting solely from their own bad faith, inconsistent conduct.

Assuming arguendo that there was not a new agreement and that Respondents are not estopped to assert a breach of the Registration Agreement, then by virtue of the stipulated fact that Petitioner offered, and Respondents accepted, registration of their stock in the Inland Dynatronics registration, Petitioner performed its obligation under the

Registration Agreement. If we ignore the fact that a "new agreement" was made superseding the original Registration Agreement, this conclusion is inescapable. The parties had to be operating either under a new agreement or under the original agreement. Assuming them to be operating under the original agreement, then Petitioner was only doing what the Registration Agreement required it to do -- furnish Respondents with one, and *only one,* cost-free registration.

Courts will always adapt a reasonable construction of a contract and will avoid a construction which is unreasonable, inequitable and oppressive. *Portland Gasoline Co. v. Superior Marketing Co.,* 150 Tex. 533, 243 S.W. 2d 823, 824 (1951); *Service Mutual Insurance Company v. Chambers,* 289 S.W. 2d 949, 951 (Tex.Civ.App. 1956, *error ref'd.); Farry v. Landreth,* 404 S.W. 2d 620, 622 (Tex. Civ.App. 1966, *error ref'd.,n.r.e.); Hicks v. Smith,* 330 S.W. 2d 641, 646 (Tex.Civ.App. 1959 , *error ref'd., n.r.e.); King v. Brevard,* 378 S.W. 2d 681, 683-684 (Tex.Civ.App. 1964 , *error ref'd., n.r.e.); and Green Avenue Apartments v. Chambers,* 239 S.W. 2d 675, 685 (Tex.Civ.App. 1951, n.w.h.). Applying this rule of construction to the precise language of the Registration Agreement itself, it becomes readily apparent that it was the intention of the parties to allow Respondents one and *only* one "free ride" in registering their stock. The Agreement states that Petitioner is obligated to file "only one" registration (see closing sentence to subparagraph 4(b), R. 12-13). The closing sentence to subparagraph 4(d), providing for the inclusion of Respondents' stock in a registration relating to an offering by Petitioner of its securities, provides specifically that the "Shareholders" shall bear the expenses of registration unless

". . .the shareholders have not ever requested registration pursuant to the provisions of paragraph 4(a), then NMS shall pay all of the expenses. . ." (R.14)

The intention of the parties could not have been more unambiguously stated. The parties even contemplated that a mere "requested registration" would impose upon Respondents the expenses incident to a second demand for registration. Yet, the construction which Respondents contend for would give them the right to make several repeated requests for, and withdrawals from, a "free ride."

Therefore, when Respondents withdrew from this cost-free registration they did what the plaintiff did in *Stahly, Inc. v. M. H. Jacobs Co.,* 7 Cir. 183 F2d 914 (1950), cert. den. 340 U.S. 896, when he signed the letter of consent agreeing "not to assert any rights or claims contrary to the (defendant's) rights to realize upon the security" and what the plaintiff did in *Church v. Bobbs-Merrill Co.,* 7 Cir.,272 F2d 212 (1959), when she demanded the return of her manuscript. Both plaintiffs were held to have waived their rights under contract just as this Court must hold that Respondents waived their right to one cost-free registration by their inconsistent conduct in rejecting a cost-free registration.

CONCLUSION

Both judgments below blindly hold Petitioner liable for its refusal to honor a written demand which utterly fails to comply with the terms of the contract of the parties and reward Respondents a recovery of the full value of registered

stock and allow them to keep the stock, too. They permit this double recovery to be predicated upon a demand which Respondents admitted they made in bad faith a mere eleven days after their stock would have been duly registered but for their own inconsistent conduct. We respectfully submit that justice is not so blind as to overlook, excuse and reward such unconscionable conduct. These injustices visited upon Petitioner by the judgments below cry out for correction by this the Highest Court of our land.

For the foregoing reasons, this Petition for Writ of Certiorari must be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Logan Ford, attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of November, 1975, I served copies of the foregoing Petition for Writ of Certiorari on Respondents by mailing copies thereof in duly addressed envelopes, with postage prepaid, to their attorneys of record as follows:

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LOGAN FORD

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AUGUST 18, 1975

Harold B. SCHWARTZ,
Plaintiff-Appellee,
v.
NMS INDUSTRIES, INC.,
Defendant-Appellant,
v.
Erich ROSENBAUM,
Plaintiff-Intervenor-Appellee

No. 74-3275

United States Court of Appeals,
Fifth Circuit
Aug. 18, 1975

Action was brought by stockholders of an acquired corporation against the acquiring corporation for the latter's alleged nonperformance of an agreement to register stock. The stockholders prevailed in the United States District Court for the Northern District of Texas at Dallas, Eldon B. Mahon, J., and the defendant appealed. The Court of Appeals, Thornberry, Circuit Judge, held that there was no waiver or estoppel which would provide a defense to the action,and that the corporation's willingness to include the stockholders' shares in a registration statement covering other stock did not discharge the contractual obligation where the corporation had acquiesced in the stockholders' withdrawal of their oral acceptance of the offer for such

inclusion. To the extent that failure or refusal to register prevented sale of the stock, there was conversion thereof, in effect, and damages were properly measured as the value of marketable common stock on the date when stockholders could reasonably have expected to sell it, but the award should have been reduced by value of the stock which could have been sold despite nonregistration, i.e., for failure of stockholders' to fulfill their duty to mitigate their damages by selling the maximum amount of stock allowable, by rule, without registration.

Affirmed in part, reversed in part and remanded.

1. Contracts 238(2)

Under Texas law, parties to a written agreement may subsequently make oral modifications to that agreement.

2. Contracts 236

Where corporate party to agreement, in offering to include stock owners' shares in registration statement covering other stock, was only offering to perform its original contract or duty to provide one cost-free stock registration, and nothing in original registration agreement compelled stock owners to avail themselves of any particular opportunity to register shares, there was no modification of original agreement by stock owners' oral, later revoked, acceptance of such offer to perform.

3. Novation 1

Under Texas law, novation is unenforceable without

consideration.

4. Novation 1

Where parties to agreement were not receiving anything more than they were originally entitled to, there was no consideration for novation.

5. Contracts 316(1)

Where parties at no time indicated intention to relinquish their contractual right to one cost-free stock registration and, after they had orally accepted a particular offer of registration, there had been acquiescence in withdrawal of oral acceptance and parties had returned to their original posture under registration agreement, there was no waiver.

6. Estoppel 58

Where benefit which was lost by revocation of oral acceptance of offer to perform stock registration agreement in particular manner was not one to which the party to the agreement had been contractually entitled, such loss was not a legal detriment which would support finding of estoppel.

7. Contracts 296

Where stock owners were contractually entitled to preparation and filing of registration statement by corporation, corporation's willingness to include stock owners' shares in another registration statement did not discharge contractual obligation where corporation had acquiesced in stock

owners' withdrawal of oral acceptance of offer for such inclusion.

8. Contracts 277(2)

Where request for performance of agreement conformed to terms of original stock registration agreement, which was then still in effect, subsequent request to go beyond contractual obligation put other party under no obligation to accede, but neither did it discharge the obligation.

9. Contracts 212(1)

Clear import of provision of stock registration agreement was to require corporation, after receipt of valid demand, to either proceed to register stock or to furnish opinion from its counsel within reasonable time that registration was unnecessary, and opinion rendered almost one year after demand did not constitute performance sufficient to discharge registration obligations.

10. Damages 62(3)
Trover and Conversion 1, 47

Stock owners making valid demand for registration in accordance with registration agreement gained right to hold marketable stock, and, to extent that failure or refusal to register prevented sale of the stock, there was conversion thereof, in effect, and damages were properly measured as value of marketable common stock on date when stockholders could reasonably have expected to sell it, but award should have been reduced by value of the stock which could

have been sold despite nonregistration, i.e., for failure of stock owners to fulfill their duty to mitigate their damages by selling maximum amount of stock allowable, under rule, without registration.

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Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and GEWIN and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge:

Resolution of this contractual dispute depends upon the proper interpretation under Texas law of the conduct of the parties after execution of a registration agreement in connection with a corporate acquisition. The district court determined that the acquiring company, NMS Industries, Inc., had breached its contractual obligation to the two shareholders of the acquired company, making it liable for substantial damages. NMS now challenges that judgment here. While we affirm the district court's decision on the liability issue, we remand for further findings of fact and conclusions of law on the damages question.

Harold Schwartz and Erich Rosenbaum, the appellees, owned all of the stock of Star Ribbons, Inc., a Texas corporation. NMS Industries, Inc. acquired Star Ribbons through an exchange of stock. In connection with the acquisition agreement,[1] Schwartz and Rosenbaum executed a registration agreement with NMS on December 19, 1969. That agree-

1. Schwartz, Rosenbaum, NMS Industries and Star Ribbons, Inc. executed an acquisition agreement on September 17, 1969. Under the terms of that document, NMS agreed to purchase all of Star Ribbons' outstanding stock for 86,000 shares of NMS common stock. The

ment, contained the following provision relative to registration of the NMS shares Schwartz and Rosenbaum would receive in exchange for their Star Ribbons stock.

> 4.(a) NMS agrees that if, in the opinion of its counsel, or Shareholder's aforesaid counsel, any offer, sale or other disposition by a Shareholder of any Shares will require (i) the registration of such Shares under the Act, or (ii) the delivery of a prospectus which complies with Section 10 of the Act, upon receipt at any time within the three (3) year period commencing with the Delivery Date specified in said Agreement, of a written demand from Shareholders who then hold at least 50% of the NMS Common Stock received under the Agreement, it will cause a registration statement with respect to the Shares which Shareholders propose to sell or otherwise dispose of to be filed under the Act. If aforesaid counsel for NMS or any Shareholder is of the opinion that any offer, sale or disposition contemplated by such Shareholder will not require the registration of such Shares under the Act, such counsel shall render such opinion to NMS and such Shareholder and to any broker or dealer acting on his behalf in connection with such offer, sale or disposition. Each Shareholder agrees not

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parties amended the agreement on December 12, 1969 to provide that NMS would deliver 70,000 shares of its common stock at the initial closing and up to 15,000 shares at a supplemental closing. The modification reflected a downward revision in the estimated net income and equity of Star Industries for the year ending September 30, 1969. The parties executed a supplemental modification on February 1, 1971 that obligated NMS to deliver the entire 15,000 supplemental shares.

> to offer more than 25% of his Shares received under the Agreement for such registration during the one (1) year after Delivery Date, nor more than 50% of such Shares for registration during the first two (2) years after such Delivery Date.
>
> . . . .
>
> It is understood and agreed that NMS shall be required to file only one such Registration Statement pursuant to Section 4(a) hereof.

Pursuant to the agreement for NMS's acquisition of Star Ribbons, Inc., Schwartz and Rosenbaum each received a total of 40,375 shares of unregistered NMS common stock.[2] For purposes of the registration provision above, the delivery date of those shares was May 1, 1970.[3]

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2. David R. Barnes received a total of 4,250 shares of NMS Industries common stock for his role in the acquisition. NMS subsequently registered Barnes' shares and he is not involved in these proceedings.

3. Section 1.8 of the first modification of the acquisition agreement provided:

> If at initial closing listing approval has not been obtained, and the NMS shares issued, then within ten (10) days after listing approval, on at least three (3) business days prior notice to the Escrowees and Shareholders, (the Delivery Date) the NMS shares shall be delivered to the Shareholders at the offices of Star aforesaid, same time.

Listing approval had not been obtained by the time of the initial closing. The American stock Exchange began to list NMS stock in April 1970, and the escrowees delivered the NMS shares to Schwartz and Rosenbaum on May 1, 1970. The court below properly found the

Shortly before the Star Ribbons acquisition, NMS acquired Inland Dynatronics Company by a similar exchange of stock. In early 1970, NMS began to prepare a registration statement in connection with the NMS common stock held by the Inland Dynatronics principals. It offered to allow Schwartz and Rosenbaum to include their stock in this registration. The two orally accepted that offer, but in a letter written in July 1970, they stated that they did not wish to include their shares in that registration. NMS proceeded to file the Inland Dynatronics registration without including the Schwartz-Rosenbaum shares, and the statement became effective August 19, 1971. On August 30, 1971, Schwartz and Rosenbaum made a written demand that NMS Register 50% of their shares. The pair then sent another letter dated September 9, 1971 demanding that NMS register all of their shares. NMS refused to honor either demand, and eventually this lawsuit arose.

The district court correctly found that the August 30, 1971 letter demanding registration of 50% of the stock held by Schwartz and Rosenbaum conformed to the terms of Section 4.(a) of the registration agreement. That demand was in writing, made by shareholders holding at least 50% of the NMS stock received under the NMS Star Ribbons acquisition agreement, and requested registration of the maximum amount of stock permissible at that time under the agreement. NMS admittedly failed to file a registration statement covering the stock within 120 days after the demand. And it failed to use its best efforts to make the registration statement filed effective as soon as practicable as required by Section 4.(b)(ii) of the registration agreement.[4] Thus NMS is clearly liable to Schwartz and Rosenbaum for its breach of the registration agreement unless some conduct on their part before or after the August 30, 1971 demand excused NMS from performance of its obligation to register the stock.

[1-4] NMS first contends that when Schwartz and Rosenbaum orally agreed to have their stock registered with the Inland Dynatronics registration statement, they modified the terms of the original registration agreement. Then NMS contends that the subsequent withdrawal from the Inland Dynatronics registration waived any right to a cost-free registration, discharging NMS. It is clear that under Texas law, the parties to a written agreement may subsequently make oral modifications to that agreement. University State Bank v. Gifford-Hill Concrete Corp., 431 S.W. 2d 561 (Tex. Civ. App. —Ft. Worth 1968, writ ref's n. r.e.). But the oral acceptance here did not create any new agreement. NMS only offered to perform its original contractual duty to pro-

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delivery date in Section 4.(a) of the registration agreement was May 1, 1970. Conclusion by Law 4. Though Schwartz and Rosenbaum received an additional 7,125 shares in 1971, for purposes of the registration agreement the delivery date for all shares was May 1, 1970.

4. Section 4.(b)(ii) of the registration agreement required NMS to:

> file within 120 days after the demand, and use its best efforts to make effective at the earliest practicable date consistent with the procedures then followed by the Securities and Exchange Commission, a registration statement under the Act (the "Registration Statement") with respect to the Shares covered by the demand and/or such sales or dispositions thereof, and advise the Shareholders when the Registration Statement has become effective. . . . .

vide one cost-free registration.[5] Nothing in the original registration agreement compelled Schwartz and Rosenbaum to avail themselves of any particular opportunity to register their shares in the three year time period. After the oral acceptance, NMS began to perform its obligations under the original registration agreement.

[5] We agree with the trial court that Schwartz and Rosenbaum did not waive their right to a cost-free registration by withdrawing their acceptance in July 1970. Waiver denotes the intentional relinquishment of a known right or conduct inconsistent with claiming it. United States Fid. & Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W. 2d 353 (Tex. 1971); Massachusetts Bond. & Ins. Co. v. Orkin Exterminating Co., 416 S.W. 2d 396 (Tex. 1967). At no time did either Schwartz or Rosenbaum indicate their intention to relinquish their right to one cost-free registration. Their oral acceptance of the offer to be included in the Inland Dynatronics registration indicated an intention to exercise their contractual right at that time. But when NMS acquiesced in the withdrawal of the oral acceptance, the parties returned to their original posture under the registration agreement. When NMS failed to protest the withdrawal Schwartz and Rosenbaum reasonably presumed they still had a right to one cost-free registration under the original registration agreement.

[6] NMS claims that the oral acceptance estops Schwartz and Rosenbaum from subsequently demanding registration of their shares. The essential elements of estoppel are established by showing that the conduct of one party has induced the other party to change his position in reliance on the conduct, and that to allow the first party to later disavow that conduct would cause substantial hardship to the second party. Massachusetts Bond. & Ins. Co. v. Orkin Exterm. Co., 416 S.W. 2d 396 (Tex. 1967); Graham v. San Antonio Mach. & Supp. Corp., 418 S.W.2d 303 (Tex.Civ. App. –San Antonio 1967, writ ref'd n.r.e.). Clearly NMS began to act upon the oral acceptance that Schwartz and Rosenbaum gave. But the other eseential element of estoppel is not present here. The advantage to NMS of "piggybacking" the Schwartz-Rosenbaum shares with the shares of the Inland Dynatronics principals was that it enabled NMS to discharge its obligation to provide a cost-free registration to Schwartz and Rosenbaum at essentially no cost. Since the cost of preparation of a registration statement was approximately $75,000, this was a substantial benefit. NMS lost that potential saving when Schwartz and Rosenbaum refused to be included. But that is not a benefit to which they were contractually entitled under the registration agreement. Thus they suffered no legal detriment when the two subsequestly refused to allow NMS to register their shares. NMS

5. Since NMS was only offering to fulfill its original contractual obligation, there was also no consideration for the "new agreement." Under Texas law, a novation is unenforceable without consideration. Pasadena Police Officers Ass'n v. City of Pasadena, 497 S.W. 2d 388 (Tex.Civ.App.—–Houston [1st Dist.] 1973, no writ); University State Bank v. Gifford-Hill Con. Corp., 431 S.W. 2d 561 (Tex.Civ.App.—–Ft. Worth 1968, writ ref's n.r.e.) NMS recognizes the existence of the consideration requirement, but contends it is satisfied here by the promise to include the stock in a particular registration Statement. Brief for Appellants at 15. That argument is fallacious. Schwartz and Rosenbaum were not receiving anything more than they were original entitled to —–one cost-free registration statement.

did not show that they incurred any additional costs in preparing Inland Dynatronics registration statement as a result of the oral acceptance.

[7] NMS might have been justified in including the Schwartz-Rosenbaum shares in the Inland Dynatronics registration statement. Though entitled under the registration agreement to a written demand for registration, NMS's conduct in proceeding to include the shares in the statement could have been interpreted as a waiver of the written demand requirement. *See* United States Fid. & Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W. 2d 353 (Tex. 1971); Massachusetts Bond. & Ins. Co. v. Orkin Exterminating Co., 416 S.W. 2d 396 (Tex. 1967); Equitable Life Assur. Soc. v. Ellis, 105 Tex. 526, 147 S.W. 1152 (1913). Then NMS might have justifiably refused to give effect to the July 1970 letter refusing to participate in the Inland Dynatronics registration arguing that the waiver of written demand had created an enforceable duty on the part of NMS to register the shares. Actual performance of its registration obligation would have discharged NMS's duties under Section 4.(a) of the registration agreement. *See* 5A Corbin on Contracts Section 1233. Instead NMS gave effect to the July 1970 withdrawal, leaving the parties in the same position as if the acceptance had never been given. The mere facts that it was willing to include the Schwartz-Rosenbaum shares in the Inland Dynatronics registration statement is not sufficient to discharge the contractual obligation. *Id.*

[8] We also reject NMS's strained argument that the September 9, 1971 letter requesting registration of all the shares discharged its obligation to register any. The August 30, 1971 request conformed to the terms of the original

registration agreement. At the time that demand was made, those original terms were still in effect. Thus the demand created an enforceable obligation on the part of NMS to register 50% of the shares. The subsequent request to register all the shares could not discharge the obligation. It represents a mere request that NMS go beyond its contractual obligations, and do Schwartz and Rosenbaum the service of registering the other 50% of their NMS holdings. Though under no obligation to accede to their request, neither could NMS seize upon it to get out of a distasteful contractual commitment.

[9] Even more strained is NMS's argument that the July 21, 1972 letter from David Fisher, counsel for NMS, regarding removal of the restrictive legend on Schwartz's stock discharged NMS's obligations under the registration agreement. Section 4.(a) of the registration agreement provided in part:

> If aforesaid counsel for NMS or any Shareholder is of the opinion that any offer, sale or disposition contemplated by such Shareholder will not require the registration of such Shares under the Act, such counsel shall render such opinion to NMS and such Shareholder and to any broker or dealer acting on his behalf in connection with such offer, sale or disposition.

But this provision must be read in context to determine the intention of the parties. We think the clear import of Section 4.(a) is to require NMS, after receipt of a valid demand, to either proceed to register the stock or to furnish an opinion from its counsel within a reasonable time

that registration was unnecessary. Under Section 4.(b)(ii) NMS had 120 days after demand to file the registration statement. It seems reasonable to require it to furnish the opinion within that time as well. Certainly the opinion rendered almost one year after demand does not constitute performance sufficient to discharge NMS's registration obligations.

We therefore affirm the trial judge's determination that the original registration agreement was in effect on August 30, 1971. The written demand of Schwartz, and Rosenbaum satisfied the terms of the agreement, and created an enforceable obligation on NMS to register 50% of the NMS shares they held. Neither the subsequent request nor the rendering of the opinion that registration was unnecessary discharged NMS's obligations under Section 4.(a). Therefore, the trial court correctly held NMS liable for the consequences of their breach of the registration agreement.

When NMS refused to register the Schwartz-Rosenbaum stock, it effectively prevented them from selling it. The trial court treated this as a rather technical conversion of the unregistered stock, and assessed damages as the market value of NMS stock at the time Schwartz and Rosenbaum should have been able to sell it. To determine that value, the court averaged the closing price per share for NMS stock from April 15, 1972 through April 30, 1972 and multiplied that figure by the total number of shares Schwartz and Rosenbaum held. Thus the judge awarded Schwartz and Rosenbaum a total of $83,778.18 plus interest from April 23, 1972.

[10] We find that the trial judge was essentially correct in his analysis. Once Schwartz and Rosenbaum made a valid demand for registration they performed the condition precedent under the registration agreement, and gained the right to hold marketable stock. NMS's breach of its obligations deprived Schwartz and Rosenbaum of this right. By maintaining the restrictive legend on the shares, NMS prevented Schwartz and Rosenbaum from selling the stock, and, in effect, converted the shares. *See* B & H Warehouse, Inc. v. Atlas Van Lines, Inc., 490 F.2d 818 (5 Cir. 1974); Sandor Petroleum Corp. v. Williams, 321 S.W. 2d 614 (Tex.Civ.App.—Eastland 1959, writ ref'd n.r.e.). Thus the district judge properly measured the damages as the value of the marketable NMS common stock on the date Schwartz and Rosenbaum could reasonably have expected to sell it —April 23, 1972.

However, the trial judge failed to reduce the award by the value of the stock Schwartz and Rosenbaum could have sold despite NMS's default. On April 15, 1972, the Securities and Exchange Commission (SEC) put Rule 144 into effect. Under the provisions of that rule, restricted stock held for over two years may be sold subject to certain conditions. The trial judge specifically concluded that after the effective date of Rule 144, both Schwartz and Rosenbaum could have sold some of their restricted stock despite NMS's refusal to register it. Conclusion of Law 11. Since the "conversion" of the stock results from the inability to market it, Schwartz and Rosenbaum had a duty to mitigate their damages by selling the maximum amount of stock allowable under Rule 144. LTV Corp. v. Bateman, 492 S.W. 2d 703 (Tex.Civ.App.—Tyler 1973, writ ref'd

n.r.e); Birge v. Toppers Menswear Inc., 473 S.W. 2d 79 (Tex. Civ.App.—–Dallas 1971, writ ref'd n.r.e.). Accordingly their recovery should be reduced by the market value of the amount of stock they could have sold pursuant to Rule 144. We remand the case to the trial judge for further findings and conclusions on that point.

Affirmed in part, reversed in part and remanded.

APPENDIX B

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, AUGUST 9,1974

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HAROLD B. SCHWARTZ
VS.
NMS INDUSTRIES, INC.

ERICH ROSENBAUM
VS.
NMS INDUSTRIES, INC.

CIVIL ACTION NO. CA 3-6612-E

MEMORANDUM OPINION

Plaintiff Schwartz and Intervenor Rosenbaum[1] sue herein for damages resulted from an alleged breach of written contract dated December 19, 1969, executed by and between NMS Industries, Inc. on the one hand and Harold B. Schwartz and Erich Rosenbaum on the other. Pursuant to this cause having been tried, the Court, having heard the evidence and having considered the stipulation of the parties, finds the facts and enters conclusions of law as follows:

1. Hereinafter Schwartz and Rosenbaum are referred to as plaintiffs.

Findings of Fact

1. Plaintiff Harold B. Schwartz ("Schwartz") and Intervenor Erich Rosenbaum ("Rosenbaum") are residents of Dallas County, Texas.

2. Defendant NMS Industries, Inc. ("NMS") is a corporation organized and existing under the laws of the State of New York. It maintains its principal place of business in Chicago, Cook County, Illinois.

2.(a) The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

3. On September 17, 1969, NMS entered into a written contract with Schwartz and Rosenbaum whereby Schwartz and Rosenbaum were to receive shares of unregistered common stock of NMS ("stock") in exchange for 100% of the common stock of Star Ribbons, Inc., a Texas corporation which stock was owned by Schwartz and Rosenbaum.[2] Such agreement was modified on December 12, 1969, so as to provide for Schwartz and Rosenbaum to receive not less than 70,000 nor more than 80,000 shares of NMS stock in exchange for the shares of Star Ribbons, Inc., held by Schwartz and Rosenbaum, and, for an additional 15,000 shares of NMS common stock to be delivered to Schwartz and Rosenbaum over a period of time that was not to exceed four years.

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2. 4,250 shares of the stock conveyed by NMS was to be received by a third individual, not a party to this suit, in payment for services rendered in connection with the NMS-Star transaction.

4. On December 19, 1969, 70,000 shares of stock were delivered to escrow agents pursuant to the closing memorandum made in connection with the transaction. The escrow agents were to hold the stock until it was listed on the American Stock Exchange.

5. The agreement to exchange stock was further modified on February 1, 1971, and NMS agreed to deliver 15,000 shares of its commons stock to Schwartz and Rosenbaum within thirty days from February 1, 1971.

6. On May 1, 1970, escrowees delivered to Schwartz and Rosenbaum 33,250 shares of the stock each, and on June 24, 1971, 7,125 shares of the stock were delivered each to Schwartz and Rosenbaum.

7. The contract of December 19, 1969, includes a registration agreement concerning the stock of NMS received by Schwartz and Rosenbaum pursuant to the agreement of the parties. The registration agreement covers the stock received by Schwartz and Rosenbaum and provides as follows:

> "4. (a) NMS agrees that if, in the opinion of its counsel, or Shareholder's aforesaid counsel, any offer, sale or other disposition by a Shareholder of any Shares will require (i) the registration of such Shares under the Act, or (ii) the delivery of a prospectus which complies with Section 10 of the Act, upon receipt at any time within the three (3) year period commencing with the Delivery Date specified in said Agreement, of a written demand from Shareholders who then hold at least 50% of the NMS Common Stock received under

the Agreement, it will cause a registration statement with respect to the Shares which the Shareholders propose to sell or otherwise dispose of to be filed under the Act. If aforesaid counsel for NMS or any Shareholder is of the opinion that any offer, sale or disposition contemplated by such Shareholder will not require the registration of such shares under the Act, such counsel shall render such opinion to NMS and such Shareholder and to any broker or dealer acting on his behalf in connection with such offer, sale or disposition. Each Shareholder agrees not to offer more than 25% of his Shares received under the Agreement for such registration during the one (1) year period after delivery date, nor more than 50% of such shares for registration during the first two years after such delivery date.

(b) If NMS is required to file a registration statement with respect to Shares as aforesaid, it will:

(i) * * *
(ii) * * *
(iii) * * *
(iv) * * *

It is understood and agreed that NMS shall be required to file only one such Registration Statement pursuant to Section 4.(a) hereof."

8. Defendant in December, 1970 undertook to register certain of its stocks owned by Messrs. Samuel Levitt and Jack Liss et ux, persons who were not parties to the contract before the Court. Defendant thereupon tendered to plaintiffs the opportunity to include their stock in such registration statement at no expense to plaintiffs.

9. Plaintiffs, though not in writing, made initial acceptance that their stock be included in said registration statement. Subsequently plaintiffs by letter of July, 1970, waived further notice pertaining to the proposed offering and "confirmed" that they did not wish to sell their NMS shares or to have such shares included in said registration statement.

10. Defendant duly proceeded with said registration without including plaintiff's stock therein which registration became effective by order of the Securities and Exchange Commission on August 19, 1971.

11. Plaintiffs by letter dated August 30, 1971, and received on or about September 1, made demand upon defendant to register 50% of their stock pursuant to the agreement dated December 19, 1969, at defendant's cost and expense in excess of $75,000.

12. The stock which Schwartz and Rosenbaum received was "lettered" stock, and was not saleable unless it was registered or eligible for exemptions on the rules of the Securities and Exchange Commission.

13. Defendant declined to honor plaintiffs' demand for cost-free registration evidenced by the letter of August 30,

1971.

14. NMS did not attempt to register the stock of Schwartz and Rosenbaum after the demand of August 30, 1971.

15. On May 19, 1972, a letter by David Fisher, Attorney at Law of the Bar of the State of New York, counsel for NMS, was sent to NMS stating that in Mr. Fisher's opinion, that the stock held by Schwartz and Rosenbaum may be sold up to the numerical limitations set forth in Rule 144.

16. The value of NMS stock on August 30, 1971, was $3.125 per share.

17. The value of NMS stock as of the date of trial is 0.125 per share.

Conclusions of Law

1. The Court has jurisdiction to hear this matter as there is complete diversity of citizenship between the parties and the amount in controversy is in excess of $10,000.00, exclusive of interest and costs.

2. The registration agreement between the parties required NMS to cause a registration of the stock to be made upon demand therefor by Schwartz and/or Rosenbaum.

3. At the time of the demand of August 30, 1971, no exemptions from the requirements of registration of the stock to allow the sale thereof were available to Schwartz and Rosenbaum.

4. The demand of August 30, 1971, was in compliance with requirements of the registration agreement.

In this connection it is to be noted that the contract between plaintiffs and NMS speaks of but one "delivery date" and one period of time to be measured therefrom. The "delivery date" was to be determined with reference to the time at which listing approval was given by the American Stock Exchange.[3] On May 1, 1971, the escrowees, subsequent to the stock being given listing approval, delivered 33,250 shares of stock to plaintiff Schwartz and a like amount to Rosenbaum. While sometime thereafter an additional allotment of 7,125 shares was delivered to each of them, the date at which such subsequent shares of stock would become eligible for registration, and the amounts and percentages eligible were to be determined the original "delivery date" to which reference is made in the agreements.

5. The parties to a contract may enter into any lawful agreements they desire,and, as a general rule, they will be bound by the express provisions of their agreement. In this connection it is noted that nowhere in the contract is there any provision which would suggest that the registration of common stock by Samuel Levitt and Jack Liss, who were not parties to the contract now under consideration, would re-

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3. The provision in the agreements relative to the delivery date is as follows:

"If at closing listing approval has not been obtained, in the NMS shares issued, then within ten days after listing approval, on at least three business days prior notice to the escrowees and shareholder, (the delivery date) the NMS shares shall be delivered to the shareholders at the offices of Star aforesaid, same time."

quire that the plaintiffs avail themselves of that particular opportunity to have their shares of stock registered. Such registration by individuals who were not parties to the contract would not trigger any of the provisions of Section 4(a) of the contract requiring the piggy-backing nor would such registration by Liss and Levitt constitute the one registration that was to be undertaken pursuant to Section 4(a). Further, the "request" of Schwartz and Rosenbaum to be included in the Liss-Levitt discretion was not in writing as provided for in paragraph 4(a) of the contract.

6. The letter from counsel for NMS dated July 21, 1972, subsequent to the effective date of Rule 144 of the Securities and Exchange Commission was not timely and did not reflect diligence on the part of NMS. Said letter was not sufficient to come within the provision of Section 4(a) whereunder the opinion could be rendered that registration of shares would not be required.

7. It being incumbent upon NMS to honor that request in the absence of some exception or in the absence of there being a valid opinion that registration was not necessary, plaintiffs Schwartz and Rosenbaum would have available to them either a cause of action at law or in equity.

8. The failure to transfer stock by removing the restrictive legend is a conversion of the stock for which monetary damages will lie.

> "It is well established that an action at law for damages may be brought against a corporation for refusal to transfer stock. The theory is that the

> refusal to transfer is a conversion of the stock. The refusal to transfer would seem to be a highly technical form of conversion; it is merely a denial of the right of the holder of the certificate to be recognized as a stockholder." F. T. Christy, The Transfer of Stock § 266 at 22:12-14 (5th ed. 1972); Case v. Citizen's Bank, 100 U.S. 446; Rio Grande Cattle Co. v. Burns, 17 S.W. 1043 (Tex. 1891).

9. It is to be noted that in addition to the contractual rights herein involved, under Section 8.401(b) of the Uniform Commercial Code as adopted by the State of Texas,

> "where an issuor is under a duty to register a transfer of a security the issuor is also liable to the person presenting it for registration or his principal for a loss resulting from any unreasonable delay in registration or failure or refusal to register the transfer." Tex. Bus. & Comm. Code Ann., § 8.401 (b) (Tex. UCC 1968).

10. While it would appear that no more shares could be registered pursuant to the August 30, request than could have been registered by piggy-backing with the Liss-Levitt registration effective August 19, 1971, there was as stated, no requirement that plaintiffs include their shares in that registration and it would further appear that such registration of August 19, 1971, would not preclude their subsequent request for registration of their stock.

11. There is considerable dispute regarding the time at which plaintiffs' stock could have been sold had there been

no refusal by defendant to transfer it. Plaintiffs' testimony suggested that the earliest date would be three months after the initial request, or about December 1, 1971; plaintiffs' testimony indicated a more likely date would be between January 1 and February 1 of 1972. On the other hand, one of the directors of NMS testified that accounting matters concerning NMS, in conjunction with SEC requirements, would result in there possibly being a year or even longer from the date of the request before plaintiffs would be able to sell their shares of stock. In this regard it is noted that the conversion of the stock occurred when NMS refused to remove the restrictive legend from the stock and thereupon transfer it; this was in September of 1971. Had the plaintiff's request for registration on August 31, 1971, been honored; each of them could have sold half of his shares. Under the ruling of the Court, the conversion would therefore prehend a total of 40,375 shares. In attempting to resolve the discrepancy between the dates the parties urge the stock would be eligible for sale, the Court has concluded that the stock would have reasonably been subject to conveyance between April 15 and May 1 of 1972. In this connection it is noted that SEC regulations were modified in 1972 and that under Rule 144, which became effective on April 15, 1972, it appears certain that at least a percentage of stock could have been sold without registration, regardless whether there had been a conversion.

12. The Court concludes that the measure of damages for the conversion is the value of the stock at such time as it could have reasonably been expected to be subject to sale

after the request for its transfer, plus interest.[4] *See* F. T. Christy, *The Transfer of Stock* ,§270 (5th ed. 1972). In this connection the Court concludes that the measure of damages in the cause at bar is to be determined by ascertaining the average closing price per share for NMS stock for the period from April 15 through April 30, 1972, those dates being inclusive; that figure will be multiplied by a factor of 40,375, the number of shares converted.

As the Court does not have evidence of the value of the shares for the period mentioned, judgment will be withheld until the parties provide said information, preferably by stipulation. The information is to be furnished the Court on or before August 19, 1974.

If there is no agreement on this matter, the closing figures recited in the Wall Street Journal for the dates in question will be considered determinative and are to be provided by affidavit of the plaintiffs.

Plaintiffs are to provide a proposed judgment to be entered by this Court upon determination of the amount of damages herein. Interest will be assessed against NMS Industries from April 23, 1972, at 6% per annum.

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4. The Court considers it noteworthy that honoring the contract by having plaintiffs' stock registered would have cost NMS in excess of $75,000.00; it would not have been unreasonable to conclude at the time of the conversion that breach of the contract would have resulted in damages of a smaller amount than the expenditure necessary for registration.

Entered this 9 day of August, 1974.

s/ Eldon B. Mahon
UNITED STATES DISTRICT
JUDGE